87-131

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

SIERRA CLUB,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

SIERRA CLUB,

Petitioner,

v.

MONOCHEM, INC.,

Respondent.

SIERRA CLUB,

Petitioner,

v.

COPOLYMER RUBBER AND CHEMICAL CORP. *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Michael Osborne
Osborne, McComiskey & Richardson-Harp
3420 Prytania Street
New Orleans, LA 70115
(504) 891-4418

James Thornton
Albert H. Meyerhoff*
Natural Resources Defense Council
90 New Montgomery St.
San Francisco, CA 94105
(415) 777-0220

James Simon
Natural Resources Defense Council
122 East 42nd St.
New York, N.Y. 10168
(212) 949-0049

Attorneys for Petitioner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTION PRESENTED

Did the court below err in holding that a federal court lacks jurisdiction to hear a citizen suit under the Clean Water Act against a defendant that violated its discharge permit both before and after commencement of the action, on the ground that such defendant is not "in violation" of its permit when the action was filed, contrary to the Fourth Circuit in *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), and the First Circuit in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corporation*, 807 F.2d 1089 (1st Cir. 1986)?

PARTIES TO THE PROCEEDINGS

Petitioner and plaintiff-appellant below is Sierra Club, a non-profit corporation organized under the laws of the State of California.* Respondents and defendant-appellees below are Copolymer Rubber & Chemical Co., Allied Corp., Bercen, Inc., Formosa Plastics Corp., Monochem, Inc., and Shell Oil Co.

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* Statement pursuant to Supreme Court Rule 28.1: Petitioner has no subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Sierra Club respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-captioned proceeding on May 29, 1987.

This Court has granted a writ on the identical question presented in this petition in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation and Natural Resources De-*

fense Council, Inc., No. 86-473. This Court's decision in *Gwaltney* will in all likelihood require the modification of the opinion below. The requested writ should thus be granted to keep open the judgment in the six cases consolidated below, so that it can be conformed to the decision that this Court enters in *Gwaltney*.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 817 F.2d 1169 and is reprinted in the appendix hereto ("App.") at 1.

The opinions of the United States District Courts for the Middle and Eastern Districts of Louisiana are reprinted at App. 26.

JURISDICTION

Sierra Club brought suit against the six respondents for violation of their Clean Water Act discharge permits, pursuant to the Act's citizen suit provision, 33 U.S.C. § 1365.

Five of the six cases were brought in the Middle, and one in the Eastern, District of Louisiana. The actions against Copolymer Rubber & Chemical Co., Allied Corp., Bercen, Inc., and Formosa Plastics were consolidated by the district court and dismissed on February 7, 1985. The suit against Monochem, Inc. was dismissed on December 18, 1985. The action against Shell Oil Co. was dismissed on October 30, 1985.

Sierra Club appealed each ruling, and the cases were consolidated on appeal. The Fifth Circuit affirmed the dismissals on May 29, 1987.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides:

> Citizen Suits
>
> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalities under section 1319(d) of this title.
>
> * * *

STATEMENT OF THE CASE

At the time Sierra Club filed suit, the respondents had among the worst records in Louisiana of noncompliance with their Clean Water Act discharge permits (NPDES permits), as the respondents reported to the Environmental Protection Agency in the discharge monitoring reports ("DMRs") that they are required to file under the Act. The permit violations reported by the respondents on their DMRs in the record are as follows.

Copolymer Rubber, in connection with operating a synthetic rubber manufacturing facility in Baton Rouge, Louisiana, holds NPDES permit LA0000914. The permit limits Copolymer Rubber's discharges into the Monte Sano Bayou. Sierra Club sued Copolymer in April 1984. Between December 1980 and September 1984, Copolymer reported violating its permit limits at least 78 times, including 5 violations in the five months after the filing of Sierra Club's suit.[1]

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[1]The following table summarizes the permit violations that Copolymer reported in its discharge monitoring reports from December 1980 through September 1984.

Parameter	*Violations*
Copper	3
Ammonia	1
Oil and Grease	14
Chemical Oxygen Demand	44
Biochemical Oxygen Demand	1
Total Suspended Solids	1
pH	14
Total	78

Copper and Ammonia are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria intended to protect waters from the effects of these substances. 50 Fed. Reg. 30784. The remaining parameters listed above all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. United States Environmental Protection Agency, *Quality Criteria for Water*, July 1976 ("*Quality Criteria*").

Allied Chemical, in connection with operating a chemical manufacturing plant in Geismar, Louisiana, holds NPDES permit LA0006181. The permit limits Allied Chemical's discharges into the Mississippi River. Sierra Club sued Allied in April 1984. Between July 1980 and August 1984, Allied reported violating its permit limits at least 119 times, including a violation in April 1984, the month the complaint was filed, and 9 more violations in the first four months after the filing of Sierra Club's suit.[2]

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[2]The following table summarizes the permit violations that Allied reported in its discharge monitoring reports from July 1980 through August 1984.

Parameter	*Violations*
Ammonia	1
Chromium	2
Zinc	1
Fluoride	24
Total Phosphorus	19
Organic Nitrogen	8
Total Suspended Solids	2
pH	62
Total	119

Ammonia, Chromium and Zinc are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79318. The remaining parameters listed above all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

Bercen, Inc., in connection with operating a specialty chemical manufacturing plant in Denham Springs, Louisiana, holds NPDES permit LA0048704. The permit limits Bercen, Inc.'s discharges into Gray's Creek. Sierra Club sued Bercen, Inc. in April 1984. Between October 1979 and May 1984, Bercen, Inc. reported 80 violations, including one violation in April 1984, the month the complaint was filed, and one additional violation in May 1984, the month after the filing of Sierra Club's suit.[3]

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[3]The following table summarizes the permit violations that Bercen, Inc. reported in its discharge monitoring reports from October 1979 through May 1984.

Parameter	*Violations*
Biochemical Oxygen Demand	41
Chemical Oxygen Demand	16
Total Suspended Solids	19
Oil and Grease	4
Total	80

All of the above parameters contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

Formosa Plastics, in connection with operating a chemical manufacturing plant in Baton Rouge, Louisiana, holds NPDES permit LA0006149. The permit limits Formosa Plastic's discharges into the Mississippi River. Sierra Club sued Formosa Plastics in April 1984. Between November 1982 and October 1984, Formosa Plastics reported 65 violations, including 27 violations in the six months after the filing of the suit.[4]

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[4]The following table summarizes the permit violations that Formosa Plastics reported in its discharge monitoring reports from November 1982 through October 1984.

Parameter	*Violations*
Chlorine	19
Chromium	4
1,2-Dichloroethane	9
Lead	5
Total Organic Carbon	18
Total Suspended Solids	4
pH	6
Total	65

Chlorine, Chromium, 1,2-Dichloroethane and Lead are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79328. The remaining substances listed all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

Monochem, in connection with operating a vinyl chloride manufacturing facility in Geismar, Louisiana, holds NPDES permit LA0006220. The permit limits Monochem's discharges into the Mississippi River and the New River. Sierra Club sued Monochem in February 1985. Between July 1980 and March 1985, Monochem reported violating its permit limits at least 136 times. Monochem reported 11 violations in February 1985, the month suit was filed, 8 violations in March 1985,[5] the month after suit was filed, and another 10 violations in April 1985.[6]

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[5]The following table summarizes the permit violations that Monochem reported in its discharge monitoring reports from July 1980 through March 1985.

Parameter	*Violations*
Mercury	18
Copper	2
Chromium	11
Zinc	4
Oil and Grease	8
Total Organic Carbon	11
Biochemical Oxygen Demand	13
Total Suspended Solids	12
Temperature	21
pH	36
Total	136

Mercury, Chromium, Copper and Zinc are of particular concern, because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79341. The remaining substances listed all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

[6]Although jurisdiction does not depend on violations that occur at the time of filing the complaint or thereafter, petitioner will update the record of violations in each case for the information of the Court should this petition be granted.

Shell Oil, in connection with operating a petroleum refinery in Norco, Louisiana, holds NPDES permit LA0003522. The permit limits Shell's discharges into the Mississippi River and Bayou Trepagnier. Sierra Club sued Shell Oil in July 1984. Between January 1980 and March 1985, Shell reported violating its permit limits at least 132 times. Shell reported 11 violations in February and March 1985, after the suit was filed.[7]

In sum, each respondent was a chronic violator of the Clean Water Act over a period of years until sued by Sierra Club. Each of them continued to violate the Act, with varying degrees of frequency, after suit was filed. The district courts had jurisdiction to determine liability and impose injunctive relief and penalties in each case, under 33 U.S.C. §§ 1365(a), 1319(d).

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[7]The following table summarizes the permit violations that Shell Oil reported in its discharge monitoring reports from January 1980 through March 1985.

Parameter	*Violations*
Chromium, hexavalent	18
Chromium, total	2
Phenols	11
Total Organic Carbon	4
Biochemical Oxygen Demand	28
Chemical Oxygen Demand	3
Total Suspended Solids	60
pH	6
Total	132

Chromium and Phenol are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79338. The remaining substances listed all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With the Decisions of the Fourth Circuit in Gwaltney and the First Circuit in Pawtuxet Cove.

On the identical issue presented in this petition, this Court has granted a writ to review the decision of the Fourth Circuit in *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *cert. granted*, — U.S. —, 107 S.Ct. 872 (U.S. Jan. 12, 1987) (No. 86-473). The briefs in *Gwaltney* have been submitted and argument is to be scheduled by the Court.

The *Gwaltney* case, like the present cases, was a citizen suit brought to enforce a Clean Water Act discharge permit. In *Gwaltney* the defendant ceased its violations while the statutorily required notice of intent to sue was outstanding but before suit was filed. The district court held that it had jurisdiction to determine liability and impose penalties payable to the United States Treasury. The Fourth Circuit rejected defendant's claim that it could not be sued for penalties for "past" violations. The Fourth Circuit held that "citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under [the citizen suit provision]." 791 F.2d at 313. This Court granted a writ of certiorari to review the Fourth Circuit's decision, No. 86-473. The United States, 13 states, and several private organizations have filed briefs urging affirmance.

In *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), *petition for cert. filed* (U.S. March 17, 1987) (No. 86-1562), the plaintiff sought penal-

ties for past violations of the Clean Water Act, as well as other relief pursuant to pendant state law claims. The alleged Clean Water Act violations were actions in the past not capable of repetition. The First Circuit held that there was no jurisdiction in the case because the plaintiff did not allege that the defendant was "in violation" of the Act when the complaint was filed. Where such an allegation is made in good faith, however, the First Circuit ruled, the district court has jurisdiction to determine liability on a strict liability basis and impose penalties even when the facts later demonstrate that the violations were entirely in the past. 807 F.2d at 1094. The plaintiff in the case has petitioned this Court for a writ of certiorari.

The Fifth Circuit has taken a position diametrically opposed to that of either the Fourth or First Circuits.[8] In the opinion below, the court held that the district courts lacked jurisdiction over citizen suits where the defendants violated their permits both before and after the complaints were filed, unless the plaintiff shows that the violations were "ongoing" or "continuing",[9] by proving that the violations "were the product of . . . systematic neglect of discharge limitations or of inadequate pollution control facilities." 817 F.2d at 1174, App. at 11.[10]

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[8]As explained below, at pp. 21 to 22, the way the court below confused remedy with jurisdiction also brings its holding into conflict with *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978).

[9]The words "ongoing", "continuing" and "chronic" are used interchangeably in the opinion below, 817 F.2d at 1173-75, and in *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392, 396-98 (5th Cir. 1985).

[10]In each of the cases below, Sierra Club alleged in its complaint that the defendant had violated its permit, was con-

(Continued on following page)

This Court should grant the writ to resolve the direct conflict among the circuit courts' interpretations of the jurisdictional requirements of the Clean Water Act's citizen suit provision. In addition, the Fifth Circuit's decision conflicts with opinions of this Court. Finally, this Court should grant the writ because it has already accepted for review the identical question in *Gwaltney*, No. 86-473.

A. The Interpretation by the Court Below of the Citizen Suit Provision is Directly Contrary to those of the Fourth Circuit in Gwaltney and the First Circuit in Pawtuxet Cove.

The jurisdictional language at issue is the phrase "in violation" in the citizen suit provision of the Clean Water Act. The provision authorizes the district court to entertain an action by a citizen "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation". 33 U.S.C. § 1365(a)(1). "Effluent standard or limitation" is defined to include a permit or condition thereof. 33 U.S.C. § 1365(f). Where liability is found, the district court is authorized to impose penalties payable to the Treasury and to grant injunctive relief. 33 U.S.C. §§ 1365(a), 1319(d).

In these cases, the Fifth Circuit panel relied on a previous Fifth Circuit decision, *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392 (5th Cir. 1985). In *Hamker*, the court engrafted onto the statute a requirement that the alleged violations must be "continuing." Under the *Ham-*

(Continued from previous page)

tinuing and would continue to do so. *See, e.g.*, the complaint in *Sierra Club v. Shell Oil Company*, App. at 22. A similar allegation was used in each of the six complaints.

ker rule, a defendant is "in violation" of the statute only if its violations are "continuing." 756 F.2d at 396-97.[11] Its violations are not "continuing" if the violations cease prior to the filing of the complaint, even if the defendant has polluted illegally for years. Petitioner believes that *Hamker* was wrongly decided. It was explicitly rejected by the Fourth Circuit in *Gwaltney* and in important part by the First Circuit in *Pawtuxet Cove*. The court below, while purporting to follow *Hamker*, in fact goes well beyond it to restrict citizens' statutory right to enforce the Clean Water Act. In the present cases, the defendants' own discharge monitoring reports demonstrated violations both before and after the complaints were filed. Yet the court below broadened *Hamker* to encompass these cases by requiring not only a "continuing" violation but proof of negligence as a matter of jurisdictional fact. In so doing, the court made the conflict between the Fifth Circuit and the First and Fourth Circuits sharper than it was after *Hamker*.

The court below analyzed the minimum jurisdictional facts that a citizen plaintiff must prove as follows. The court noted that a single large industrial facility may have many discharge points from which many different pollu-

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[11]It should be noted that *Hamker*, in which the Fifth Circuit veered abruptly away from prior law on the regulation of discharges under the Clean Water Act, did not involve permit violations. *Hamker* involved a single accidental oil spill long in the past, and the relief requested was a variety of state law damage claims appended to a claim under the Act. It was this unappealing context that led the *Hamker* court to fashion a rationale for dismissing the case before it without examining the effect of that rationale on the ordinary case—the enforcement of industrial discharge permits. That rationale, expanded by the court below, directly conflicts with the Act, and would remove citizen suits as an effective tool of permit enforcement.

tants are discharged, each subject to separate limitations in a single permit. The court observed that where a permit applies different limitations to different point sources, the "violation of an effluent limitation at one point source is not a violation of any parameter at another point source even if the same pollutant is involved." 817 F.2d at 1173.

The court below continued:

> The DMR's submitted to EPA regularly by each of the appellees and relied on by Sierra Club to evidence permit violations separately identify effluent discharges at each point source for each parameter. Appellant's complaints simply aggregated the possible violations reflected by the DMR's at each appellee's facility over time, regardless whether [sic] they ininvolved the same substance or the same point source of discharge. *Although given ample opportunity to do so, Sierra Club did not attempt to demonstrate that these isolated permit violations were the product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities.*

817 F.2d at 1173-74, App. at 10-11 (emphasis added).

Moreover, wrote the court below,

> The evidence submitted by appellees demonstrated in many instances that the alleged "violations" were approved under EPA "bypass" regulations, were based on overly restrictive permit terms later liberalized by EPA, or were related to treatment methods voluntarily discontinued by the facility. What remained of Sierra Club's factual allegations were occasional, minor discharges by the facilities in the face of permit compliance rates exceeding 95% for the balance of the period in question.

Id. at 1174 (footnotes omitted). For these reasons, the court below held that the district courts lacked jurisdiction.

This conclusion is built on five serious errors of law. Several of these errors, in addition to conflicting with the Fourth and First Circuits' positions, contravene decisions of this Court.

First, the requirement of a "continuing" violation as a matter of jurisdictional fact is an error, and is in conflict with *Gwaltney* and *Pawtuxet Cove*. The statutory language authorizing citizen actions is identical to the language authorizing suits by the government with respect to the timing of a defendant's violations. The federal government is empowered to enforce Clean Water Act permits by Section 309(b) of the Act, 33 U.S.C. § 1319(b). That section states that:

> The Administrator is authorized to commence a civil action for appropriate relief . . . for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.

According to the subsection (a) referred to, the Administrator may issue a compliance order to, and thus may institute an enforcement action against, anyone who is "*in violation* of any condition or limitation . . . in a permit. . . ." 33 U.S.C. § 1319(a) (emphasis added).

Congress used identical language for authorizing citizen suits.[12] Section 505 of the Act, 33 U.S.C. § 1365, authorizing citizen enforcement suits, provides that:

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[12]The same language is used to authorize the Administrator to enforce permits issued by states with approved NPDES programs. *See* Section 309(a)(1) of the Act, 33 U.S.C. § 1319(a)(1). The only exception to the consistent use of the term "in violation" to trigger federal and citizen enforcement jurisdiction comes in the language authorizing federal criminal enforcement actions. There, still in the present tense, the Act authorizes criminal sanctions against one who "violates" the Act. *See* Section 309(c)(1), 33 U.S.C. § 1319(c)(1).

> . . . any citizen may commence a civil action . . . against any person . . . *who is alleged to be in violation of* . . . an effluent standard or limitation. . . .
>
> The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under [Section 309(d) of the Act] section 1319(d) of this title.

33 U.S.C. § 1365 (emphasis added).

Furthermore, Congress authorized civil penalties in § 309(d) of the Act against any person who "violates" the Act, without distinguishing between civil enforcement suits brought by the attorney general or by private attorneys general. 33 U.S.C. § 1319(d); *see also* § 1365(a). The Act makes no distinction between violations that cease the day before the complaint is filed and those that continue through the filing date. Nor is there any distinction in the Act between citizen and government ability to invoke federal court jurisdiction with respect to the timing of such violations.

There is no dispute that the government can sue for penalties for past violations without proving "continuous" or "ongoing" violations. *See, e.g., Illinois v. Outboard Marine Co.*, 680 F.2d 473, 480-81 (7th Cir. 1982); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375-76 (10th Cir. 1979). The language of the Act therefore compels the conclusion that citizens can bring suit on the same basis.

By reading the same words differently for government suits and citizen suits, the Fifth Circuit differs from

the Fourth and First circuits.[13] The Fourth Circuit held that the language "in violation" does not preclude citizen suits for "past violations," 791 F.2d at 313; the First Circuit held that the good faith allegation of facts that warrant injunctive relief will support jurisdiction over exclusively "past" violations, 807 F.2d at 1094.

Congress recently endorsed the Fourth Circuit's reading of the citizen suit provision when it revisited the Act. Congress amended Section 309 of the Clean Water Act to permit the *administrative* assessment of civil penalties and expressly used the past tense: the Administrator of EPA is authorized to assess a civil penalty against "any person [who] *has violated* . . . any permit condition or limitation." § 309(g)(1)(A) and (B), as added by the Water Quality Act of 1986, § 314(g)(1)(A) and (B); 33 U.S.C. § 1319(g)(1)(A) and (B) (emphasis added). This new authority focuses on past violations because it supplements the Administrator's pre-existing authority to issue compliance orders under Section 309(a)(1) of the Act. *See* S. Rep. No. 50, 99th Cong., 1st Sess. 26 (1985); H.R. Rep. No. 1004, 99th Cong., 2d Sess. 132-133, 135-136, 138-139 (1986). Yet, the new subsection explicitly contemplates that a citizen suit may already have been filed to assess the same penalty and, in that event, allows it to proceed. § 309(g)(6)(B), as added in 1987; 33 U.S.C. § 1319(g)(6)-(B). In addition, under this new provision a prior admin-

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[13]As petitioner pointed out below, not only the language of the statute but the legislative history support the identity of structure in suits by the attorney general and by private attorneys general, once the explicit restrictions on citizen suits, *i.e.*, 60 days notice and lack of diligent prosecution, are satisfied and the citizen suit is commenced. *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 64, 80 (1971).

istrative penalty action precludes a later citizen suit but only with respect to the identical past violations. § 309(g)-(6)(A) and (B), as added in 1987; 33 U.S.C. § 1319(g)-(6)(A) and (B).[14]

This new provision demonstrates that Congress believed existing law authorized citizen suits addressing past violations that no longer required injunctive remedies. Although the new provision dealing with administrative penalties employs the past tense in describing the violation, Congress saw no need to amend either Section 309(a) or (b) or Section 505(a)(1) to conform. This cannot have been mere oversight. The Water Quality Act was elaborately considered for over two years before ultimate enactment, affording ample opportunity for noticing and correcting any deficiency. The natural inference is that Congress saw the present tense of Sections 309 and 505 as no limitation on penalty actions in respect of past violations. Under these circumstances, this is a reliable guide to the original intent of the Clean Water Act. *Cf. Bob Jones University v. United States,* 461 U.S. 574, 599-602 (1983), and cases cited at 601.

In a second error, the court below essentially read the word "permit" out of the statute. Section 505 allows a citizen to sue anyone alleged to be in violation of an "effluent standard or limitation." "Effluent standard or limitation" is defined to include "a permit". 33 U.S.C.

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[14]The Senate Report, S. Rep. No. 50, *supra,* at 28 explicitly states that the preclusive effect of an administrative penalty action does not apply to a citizen suit "for a past violation of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)."

§ 1365(f)(6). Thus, to violate a permit, without more, is to violate the Act, as this Court has held. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976).

In looking for a "continuing" violation, the court below went far beyond looking for a "continuing" permit violation. The court held that only proof of the continuing violation of the same specific permit restriction at the same discharge pipe supports citizen suit jurisdiction. 817 F.2d at 1174; App. at 10-11. Yet a chemical plant, as the court below suggested, may have one permit under which it discharges, say, 100 chemicals through 30 discharge pipes. Under the Fifth Circuit's ruling, this plant could exceed its permit restrictions for each chemical at each pipe, one after another, without incurring liability for a permit violation because the violations of separate discharge limitations would not be "continuous". This is the essential holding of the court below and is absurd. To violate a permit is to violate the act. To keep violating a variety of restrictions in a permit through time is to keep violating the permit. By requiring continuous violations of the same chemical substance at the same discharge pipe for jurisdiction to attach, the court below reads permits and the requirement to comply with them out of the Act, and protects permit holders from any real chance of suit by citizens.

Third, the Court below made a serious error of law in requiring Sierra Club to demonstrate as *a matter of jurisdiction* that the violations alleged "were the product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities." As this Court

has held, to violate a permit is to violate the act, *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. at 205, and violations can be proved by reliance on a defendant's own discharge monitoring reports, *United States v. Ward,* 448 U.S. 242, 253-55 (1980), *reh'g denied,* 448 U.S. 916 (1980). Every court to consider the question has held that permits are strict liability documents, and that liability is strictly adjudged by comparing a defendant's discharge monitoring reports to its permit.[15]

As the D.C. Circuit put it in *Weyerhaeuser v. Costle,* 590 F.2d at 1058, Clean Water Act permit enforcement proceedings were designed by Congress to be simple and speedy, suitable for summary judgment. The *Weyerhaeuser* court pointed out that permits could not be enforced if enforcement proceedings "depend[ed] on murky determinations concerning the sequence of events in the plant, whether those events would have been avoidable if other equipment had been installed . . ." and so on. *Id.* The court below disagrees with *Weyerhaeuser,* and all prior precedent in other circuits. It has removed the strict liability measure of permit compliance. Instead, a citizen plaintiff must make some vaguely defined demonstration that permit violations are the "product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities." 817 F.2d at 1173-74, App. at 11. The court below would have the citizen

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[15]*See, e.g., United States v. Earth Sciences, Inc.,* 599 F.2d 368, 374 (10th Cir. 1979); *Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Job Plating Co.,* 623 F. Supp. 207, 218 (D.Conn. 1985); *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Bethlehem Steel Corp.,* 608 F. Supp. 440, 451-53 (D.Md. 1985).

suit become "a form of inquest into the nature of system malfunction", *Weyerhaeuser,* 590 F.2d at 1958, *before jurisdiction attaches.* In requiring a citizen plaintiff to make a demonstration of "neglect" by the defendant in order to support jurisdiction, the court below has confused jurisdiction with remedy.

Questions of "neglect," negligence, inadequate treatment, good and bad faith, are irrelevant to a determination of jurisdiction and liability. They are relevant only to determining what penalties and injunctive relief are appropriate once liability is strictly adjudged. *See, e.g., Student Public Interest Research Group v. Monsanto Co.,* 600 F. Supp. 1479, 1486 (D.N.J. 1985); *United States v. Amoco Oil Company,* 580 F. Supp. 1042, 1050 (W.D.Mo. 1984).

In a fourth fundamental error, the court below, in discounting the defendants' violations, offered excuses for the defendants contrary to the law of this Court. The court below discounted "alleged 'violations' . . . [which] were based on overly restrictive permit terms later liberalized by EPA . . . [A]pplication of the less restrictive terms to the above cited violations [for Shell] would decrease the number of exceedences over the three year period to approximately eight." 817 F.2d at 1174 and n.5, App. at 11-12.

This Court has held that a polluter is bound by its permit, and that even a pending permit application does not excuse it from complying with the then applicable terms. As Chief Justice Rehnquist wrote in *Train v. Natural Resources Defense Council, Inc.,* 421 U.S. 60, 92 (1975) (Clean Air Act), requests for permit variances are "carried out on the polluter's time, not the public's, for

during [their] pendency, the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures." The willingness of the court below to discount violations of what it characterized as "overly restrictive" permit terms puts it in direct conflict with this Court.

In addition, the court below was willing to discount, for purposes of jurisdiction, any violations that arise from a cause that the defendant corrects *after* being sued.[16] Such a consideration may be relevant in determining remedy, but it would frustrate enforcement to permit a defendant retroactively to deprive a court of jurisdiction by coming into compliance *after being sued.* A more convenient rule for avoiding liability could not be crafted. A polluter, under this scheme, would have no incentive to comply with the law until being sued.

The court below committed a fifth serious error by fashioning what seems to be a 95% compliance test for jurisdiction. The court below wrote that after its other excuses were applied, the defendants had permit compliance rates "exceeding 95% for the balance of the period in question." 817 F.2d at 1174, App. at 12. Once again, to violate a permit is to violate the Act. The court below seems to have stated a rule that jurisdiction does not attach if the defendant makes a statistical argument that it is in compliance 95% of the time. Whatever 95% com-

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[16]The court below found it relevant to jurisdiction that Shell completed some required chrome treatment system modifications and had them operational in February 1985, seven months *after* the complaint was filed (July 1984). *See* 817 F.2d at 1174 n.6, App. at 12.

pliance may mean, and it is by no means clear,[17] it is irrelevant to jurisdiction, though it may be considered when fashioning a remedy.

In all of these matters, the court below confused remedy with jurisdiction, and by doing so read the requirement of strict liability for compliance out of the Act.[18] The court created a variety of restrictions on citizen suits which, when taken together, effectively read the citizen suit provision out of the statute.

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[17]In the case of the hypothetical chemical plant discharging pollutants from 30 different point sources, one could comply with the restrictions at 29 discharge points all of the time, commit massive violations of a cyanide limitation at the remaining point 100% of the time, and still argue one met a "95%" overall compliance test.

[18]That the court below confused questions of remedy and jurisdiction is highlighted by a section added to the Act by the Water Quality Act of 1986. The new language, added to aid the district judge in fashioning a remedy, lists the kind of considerations the court should look to in setting a penalty.

> FACTORS TO CONSIDER IN DETERMINING PENALTY AMOUNT.—Section 309(d) is amended by adding at the end thereof the following: "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.".

Water Quality Act of 1986, Pub. L. No. 100-4, § 313(c) (1987).

These factors include the kinds of considerations pointed to by the court below. The error of the court below, again, is to bring the consideration of these factors up from the *remedial* to the *jurisdictional* stage of the lawsuit.

B. The Court Below Adopted a View of the Role of the Citizen Suit Provision Contrary to the Views of the Fourth and First Circuits.

The Court below took the view that citizen suits are supplementary to government suits, and so could be effectively nullified without harming the Congressional enforcement scheme. The Fourth and First Circuits read the Act and its legislative history very differently.[19] Each of the latter concluded that citizen suits are an important mechanism in the enforcement scheme crafted by Congress. For this reason, the Fourth and First Circuits concluded, courts should not create new restrictions on citizen suits.

The Fourth Circuit, after noting the explicit restrictions on citizen suits,[20] found that Congress specified all the restrictions it meant, and that citizen suits were intended to be an important enforcement tool. Noting the identity of language authorizing government and citizen suits, the Fourth Circuit wrote that "[i]t can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations," and "the scope of citizen enforcement powers must, in this important respect, be viewed as co-extensive with the enforcement powers of EPA." 791 F.2d at 309-310.

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[19]Neither the *Hamker* court nor the court below, unlike the Fourth and First Circuits, examined any legislative history of the Clean Water Act.

[20]The statute requires 60 days notice prior to suit, and precludes citizen action if the state or federal government has filed a prior action and is diligently prosecuting it. 33 U.S.C. § 1365 (a) and (b).

The First Circuit likewise found that citizen suits are authorized for past violations, as long as there is an allegation which, if true, would warrant an injunction.[21] The court wrote:

> We do not . . . agree with the reasoning which, apparently, led the Louisiana district court, following the *Hamker* decision, to dismiss a number of actions simply because no violations occurred on the dates the complaints were filed. *See Sierra Club v. Copolymer Rubber & Chemical Corp.*, 621 F.Supp. 1013, 1015 (M.D.La. 1985) [one of the cases in this petition]. A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.

807 F.2d at 1094.

The court below, to the contrary, read citizen suits out of the statute, and justified doing so by noting irrelevantly that the state and federal governments have enforcement powers. The court below found that citizen suits are supplementary to government suits and drew the unfounded conclusion that they are supererogatory: "We think it unlikely that Congress's explicit restrictions on the right to bring private enforcement actions significantly impair the efficacy of the general regulatory framework," because "[b]oth the federal and state governments can abundantly enforce the Clean Water Act by means of

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[21]Petitioner believes that the Fourth Circuit read the Act correctly and that insofar as the First Circuit required any allegation of continuing violation it was in error. Petitioner has argued this position in an *amicus curiae* brief in *Gwaltney*, No. 86-473.

criminal and civil actions authorizing monetary or injunctive awards." 817 F.2d at 1175, App. at 15.

The court below is correct that the governments *could* enforce the law. The citizen suit mechanism, of course, was designed precisely to fill the gap when governmental agencies cannot or will not exercise their enforcement authority. The court below is also correct to say that the restrictions that *Congress,* as opposed to the court below, placed on citizen suits do not impair the enforcement scheme. The adventitious restrictions created by the court below, however, tend to remove citizen suits from the enforcement scheme.

The view of the court below, that the "efficacy of the general statutory framework" is not impaired by disabling citizen suits, is a view directly contrary to that of the Fourth and First Circuits.

C. The Decision Below Cannot Be Reconciled With the Decisions of the Fourth and First Circuits.

The Fifth Circuit's prior ruling on citizen suits under the Act, *Hamker,* was the case relied on by the petitioners in *Gwaltney* to support their argument that there was a split in the circuits on the question of whether a citizen suit under the Act could be maintained for a "past" violation. This Court granted their petition for writ of certiorari, No. 86-473.

The opinion below creates an even sharper conflict. The court below, stating that it was bound by *Hamker,* extended that ruling broadly. While in the Fourth Circuit, under *Gwaltney,* a citizen action may be maintained based on DMRs for violations that ceased prior to the

filing of the complaint, and while in the First Circuit, under *Pawtuxet Cove*, a citizen suit may be maintained on the same facts if the plaintiff alleges ongoing violations in good faith, the court below requires much more. Saying that a "continuing" violation is required, the court below then requires proof of neglect or negligence as a matter of jurisdiction. The view of the court below is diametrically opposed to those of the Fourth and First Circuits and cannot be reconciled with them.

II. The Question Over Which the Fifth Circuit Has Split With the Fourth and First Circuits is Important and Recurring.

Congress, in reauthorizing the Clean Water Act this year, inquired into the way citizen suits were working. It noted that "[i]n the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act," S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985), and declared itself well satisfied with the result, *id.*

Citizens in the Fifth Circuit are now effectively disabled from exercising their statutory right to enforce the Act, and are permitted to exercise it elsewhere in the country. Until the errors of the court below are corrected, polluters in the Fifth Circuit will enjoy a protection that Congress did not allow them, and that they do not have elsewhere. Moreover, the decision of the court below, until corrected, will tend to chill the effectiveness of citizen suits in other areas of the country as well.

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CONCLUSION

For the reasons set out above, this Court should grant the writ requested.

Respectfully submitted,

Michael Osborne
Osborne, McComiskey & Richardson-Harp
3420 Prytania Street
New Orleans, LA 70115
(504) 891-4418

James Thornton
Albert H. Meyerhoff*
Natural Resources Defense Council
90 New Montgomery St.
San Francisco, CA 94105
(415) 777-0220

James Simon
Natural Resources Defense Council
122 East 42nd St.
New York, N.Y. 10168
(212) 949-0049

* Counsel of Record

Attorneys for Petitioner

SIERRA CLUB v. SHELL OIL CO.

SIERRA CLUB, Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

Appeal from the United States District
Court for the Eastern District
of Louisiana

SIERRA CLUB, Plaintiff-Appellant,

v.

MONOCHEM, INC., Defendant-Appellee.

SIERRA CLUB, Plaintiff-Appellant.

v.

COPOLYMER RUBBER AND
CHEMICAL CORP., et al.,
Defendant-Appellee.

Nos. 85-3753, 85-3762, 85-3763.

United States Court of Appeals,
Fifth Circuit.

May 29, 1987.

Environmental organization brought actions under Clean Water Act based on multiple, sporadic, and past violations of various effluent limitations. The United States District Court for the Eastern District of Louisiana, Patrick E. Carr, J., and the United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., either dismissed cases or awarded summary judgment to

defendant. Appeals were taken. The Court of Appeals, Edith H. Jones, Circuit Judge, held that multiple, sporadic, and past violations of various effluent limitations could not form basis of citizens' lawsuits.

Affirmed.

1. Federal Courts 29

Where defendant's challenge to court's jurisdiction is also a challenge to existence of federal cause of action, proper course is to find that jurisdiction exists and deal with objection as direct attack on merits of case, and judicial economy further counsels resolution on merits so that court can avoid duplicative trials of facts essential to both jurisdiction and merits.

2. Federal Civil Procedure 2481

When plaintiff bringing citizens' lawsuit under Clean Water Act has alleged ongoing violation, but fails to demonstrate fact issue about whether defendant is "in violation," trial court should grant summary judgment for defendant on merits, instead of dismissing for want of jurisdiction. Federal Water Pollution Control Act Amendments of 1972, § 505(a), as amended, 33 U.S.C.A. § 1365(a); Fed.Rules Civ. Proc.Rules 12(b)(1), 56, 28 U.S.C.A.

3. Federal Civil Procedure 1781

Although fact-based dismissals of Clean Water Act actions were contrary to the Fifth Circuit's practice of ruling on the merits, dismissals did not fatally affect disposition of cases where orders dismissing for lack of jurisdiction were entered following extensive discovery. Federal Water Pollution Control Act Amendments of 1972,

§§ 101 et seq., 505, as amended, 33 U.S.C.A. §§ 1251 et seq., 1365; Fed.Rules Civ. Proc.Rule 12(b)(1), 28 U.S.C.A.

4. Health and Environment 25.15(4)

Multiple, sporadic, and past violations of various effluent limitations contained in national pollutant discharge elimination system permits could not form the basis of citizens' lawsuits under Clean Water Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 505, as amended, 33 U.S.C.A. §§ 1251 et seq., 1365.

Appeals from the United States District Court for the Middle District of Louisiana.

Before VAN GRAAFEILAND*, HIGGINBOTHAM, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

We are here called upon to assess whether multiple, sporadic, past violations of various effluent limitations contained in National Pollutant Discharge Elimination System ("NPDES") permits held by the defendants may form the basis of a citizens' lawsuit under section 505 of the Clean Water Act.[1] 33 U.S.C. § 1365. Bound by our prior decision in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir.1985) and by appellant's failure to raise a genuine question of material fact on the critical

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* Circuit Judge of the Second Circuit, sitting by designation.

1. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.* are commonly known as the Clean Water Act.

issue, we AFFIRM the decisions of the district courts which dismissed these cases.[2]

The underlying lawsuits were filed following a systematic research program in which the Sierra Club examined discharge monitoring reports ("DMR's") filed by every major industrial discharger in Louisiana. The DMR's, which are prepared and filed by the defendant companies with the Environmental Protection Agency ("EPA"), may furnish some evidence concerning whether the discharger is in compliance with the terms of its NPDES permit for the period of time covered in each DMR. Having concluded by this research that the instant defendants were violating the terms of their NPDES permits, Sierra Club delivered the statutory 60-day notices and then filed separate lawsuits against each defendant. Each action averred that the defendant had violated various terms of its NPDES permit between January 1980 and June, 1983, and all complaints alleged that the defendant "is now violating its permit, and will do so in the future." The complaints requested that civil penalties of up to $10,000 per day of violation for each violation be imposed, that an injunction be issued against further violations, and that Sierra Club recover costs including attorneys, wit-

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2. Five of the citizens' enforcement suits were brought by the Sierra Club in the Middle District of Louisiana. The actions against Copolymer Rubber & Chemical Co., Allied Corp., Bercen, Inc., and Formosa Plastics Corp., were consolidated by the district court and dismissed on February 7, 1985. Subsequently, Sierra Club filed against Monochem also in the Middle District. This case was dismissed by the district court on December 18, 1985. The sixth of these consolidated appeals was filed against Shell Oil Co. in the Eastern District of Louisiana on July 24, 1984 and was dismissed on October 30, 1985.

ness and consultant fees, as provided for in 33 U.S.C. § 1365(d).

During the pendency of the lawsuits, this Court issued its opinion in *Hamker* and held that district courts are without jurisdiction to hear citizens' suits alleging a single past pollutant discharge in violation of the Clean Water Act. Ongoing discovery in these cases became focused on the application of *Hamker*. Because *Hamker* resulted in a dismissal of the plaintiff's complaint for want of jurisdiction, appellees each contested the court's subject matter jurisdiction, resting on affidavits and considerable documentary evidence concerning the status of the various alleged permit violations. In some of the cases, appellant responded that DMR's filed for the period after June, 1983 showed that further permit violations had occurred subsequent to the filing of its lawsuits. The district courts treated these motions differently. In the four cases consolidated under the *Copolymer* style, *see* note 2 *supra*, the court dismissed pursuant to Fed. R.Civ.P. 12(b)(1) for want of jurisdiction, without prejudice to any state law claim that might be asserted. 621 F.Supp. 1013. The *Monochem* court simply dismissed under Rule 12(b)(1), while the *Shell* court awarded a Rule 56 summary judgment to the defendant. These appeals followed.

I.

The Clean Water Act intertwines the jurisdiction of the district court with the grounds for relief in a citizen enforcement action. Under the general caption, "Citizen Suits: jurisdiction," it authorizes

> any citizen [to] commence a civil action on his own behalf—(1) against any person . . . who is alleged to

> be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. . . .

3 U.S.C. § 1365(a). Consequently, where the requirement that the discharger be "in violation" is interpreted to mean that a violation must be ongoing at the date the suit is filed, the plaintiff must allege an ongoing violation to invoke the court's jurisdiction.

The Court affirmed a dismissal in *Hamker* for lack of jurisdiction because the pleadings there alleged a single oil spill prior to the date of suit and patently excluded the possibility of the defendant's being "in violation" thereafter. *Hamker's* emphasis on jurisdiction was appropriate to that case because a court may determine it lacks jurisdiction based on pleadings alone. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1350 (1969). Two of the district courts here, apparently intending to follow *Hamker,* dismissed under Rule 12(b)(1) for lack of jurisdiction based on undisputed facts revealed in discovery rather than on the pleadings. Such fact-based dismissals are contrary to this circuit's practice of ruling on the merits, but they do not fatally affect the disposition of these cases.

[1] This Court has held that when, as here, issues of jurisdictional fact are intermeshed with the merits of a case, "the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other." *McBeath v. Inter-American Citizens for Decency Commit-*

tee, 374 F.2d 359, 363 (5th Cir.1967).[3] The purpose of this rule is to discourage district courts from dismissing cases on the pleadings for want of jurisdiction unless the pleadings reveal a clearly insubstantial or frivolous claim. *Compare Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). Thus, "[w]here the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir. 1981). Judicial economy further counsels resolution on the merits in these instances so that the court can avoid duplicate trials of facts essential to both jurisdiction and the merits of the claim. *Id.* at 415-16.

[2] As a result, when a plaintiff has alleged an ongoing violation for purposes of § 1365(a), but he fails to demonstrate a fact issue about whether a defendant is "in violation," the court should grant summary judgment for the defendant on the merits under Fed.R.Civ.P. 56, instead of dismissing for want of jurisdiction under Fed.R. Civ.P. 12(b)(1).

[3] Although the letter of *McBeath* and *Williamson* were violated in all but one of these cases, their spirit was not. None of the cases was cavalierly treated. The orders dismissing for lack of jurisdiction were entered fol-

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3. This is not to say that for cases in which the jurisdiction and merits are separable issues, such as whether $10,000 is actually in controversy in a diversity case, the district court may not dismiss pursuant to a fact finding rendered under Fed.R.Civ.P. 12(b)(1). *See* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1350 at 556 (1969).

lowing extensive discovery in each case. The district courts strained to afford Sierra Club an opportunity to demonstrate a fact issue on whether appellees were "in violation" of their permits when these suits were filed. The courts' ultimate determinations rest on a complete and undisputed factual record. Sierra Club does not contend that further discovery is necessary to support its position. Consequently, dismissing some of the cases for lack of jurisdiction was tantamount to summary judgment against Sierra Club on the merits of the critical issue of appellees' being "in violation" when the actions were filed. No reversible error follows from this procedural flaw.

II.

[4] The district courts found that under *Hamker,* the appellees in this case were not "in violation" of the NPDES permits when Sierra Club filed suit. In *Hamker,* the panel reasoned that section 1365 does not permit a citizen lawsuit to enforce the Clean Water Act where there is no ongoing violation of an effluent standard, limitation or order. Thus, the plaintiff there could not state a cause of action for a single past oil discharge. Judge Williams, specially concurring, suggested however that the statutory language "in violation" is broad enough to cover the "chronic episodic violator" who "intentionally turns off the spigot" just before a citizen brings suit. 756 F.2d at 399 (Williams, J., concurring). We need not enter a debate concerning the extent of the *Hamker* holding because the uncontradicted evidence in these cases demonstrated only past, sporadic or largely unconnected permit violations by each of the appellees. Not only was [sic] none of the violations ongoing at the date Sierra Club filed suit in

either a "chronic episodic" or actual sense, but Sierra Club never attempted to establish, and in fact eschewed the possibility that there might be any requirement of demonstrating the ongoing or chronic nature of such violations. Sierra Club's proof failed to comport with its pleadings.

To demonstrate the failure of Sierra Club's proof, it is necessary to explain how the Clean Water Act affects industrial dischargers. The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. 33 U.S.C. § 1251 (a). This objective was to be achieved by the application of increasingly more stringent "effluent limitations" designed to reduce gradually the amount of pollutants discharged into waterways. These effluent limitations are to be technologically based, meaning that dischargers must reduce the amount of pollutants by using specific technologies or their equivalents. "Effluent limitations" promulgated by the EPA are the actual restrictions on discharges which limit quantities, rates and concentrations of substances that may be discharged from point sources. 33 U.S.C. § 1362(11). Effluent limitations are usually expressed numerically (e.g., the number of pounds per day or the concentration of a pollutant discharged). Effluent limitations are to be applied to all point sources of discharge at a facility. A "point source" means the point of discharge of the pollutant-containing effluent. 33 U.S.C. § 1362(14). Effluent limitations, which were developed for entire industrial categories or subcategories, are transformed into limitations on individual plants within the category or subcategory by incorporation into the terms and conditions of NPDES discharge permits. 33 U.S.C.

§1342. If a discharger is in compliance with the effluent limitations contained in its NPDES permit, it is deemed to be in compliance with the Clean Water Act. 33 U.S.C. § 1342(k).

One industrial facility may have numerous point sources of discharge. These point sources may serve a single process unit, multiple units, single or multiple treatment facilities, or may only carry storm water runoff. To borrow appellees' example, a single site may contain an herbicide manufacturing plant, a chlorinated solvent manufacturing plant, and a plastics manufacturing plant, all of which are completely unrelated and belong to different industrial subcategories having different effluent limitations. Each plant might in turn maintain its own waste water treatment system and have several point sources for the effluents from its facilities. Due to the unique process and treatment arrangements at each plant, when incorporating effluent limitations into NPDES permits, EPA developed separate conditions for each pollutant at each separate point source. This is necessary to make effluent limitations technology-based. Also, because the treatment system for each point source may be unrelated to the treatment system for any other point source, a violation of an effluent limitation (a "parameter") at one point source is not a violation of any parameter at another point source even if the same pollutant is involved. Consequently, when determining whether a permit-holder has violated an effluent limitation, one must look at each parameter within each point source independently.

The DMR's submitted to EPA regularly by each of the appellees and relied on by Sierra Club to evidence

permit violations separately identify effluent discharges at each point source for each parameter. Appellant's complaints simply aggregated the possible violation reflected by the DMR's at each appellee's facility over time, regardless whether they involved the same substance or the same point source of discharge. Although given ample opportunity to do so, Sierra Club did not attempt to demonstrate that these isolated permit violations were the product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities. We have thoroughly reviewed the record in each of these cases. The evidence submitted by appellees demonstrated in many instances that the alleged "violations" were approved under EPA "bypass" regulations,[4] were based on overly restrictive permit terms later liberalized by EPA[5], or were

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4. In its notice to Allied and as part of its complaint filed in district court, Sierra Club claimed 21 effluent limitations "exceedences" on point source 003 from January, 1983 to May, 1983 at Allied's Geismar, Louisiana chemical complex. It is apparently undisputed, however, that these "exceedences" were a direct result of "bypass" discharges approved by the EPA. Under 40 C.F.R. § 122.60 (1982) (superseded) Allied sought and obtained EPA approval of anticipated "bypass" resulting in diversion of water from its "treatment facility" and discharge into the Mississippi River. According to the terms of the administrative order allowing "bypass", the EPA found that Allied "anticipates the need to discharge process wastewater from the Clearwell of the water recirculation system because the Company claims that precipitation events and lack of production will cause the process wastewater level to rise into surge capacity of the Clearwell." Thus, on January 21, 1983 the EPA approved the requested discharge of wastewater until May 31, 1983.

5. For example, Sierra Club's assertions of "chronic episodic" violations is demonstrated most readily from its claim that Shell exceeded its daily maximum effluent limitations of

(Continued on following page)

related to treatment methods voluntarily discontinued by the facility.[6] What remained of Sierra Club's factual allegations were occasional, minor discharges by the facilities in the face of permit compliance rates exceeding 95% for the balance of the period in question.

(Continued from previous page)

Total Suspended Solids ("TSS") on outfall 002 at its Norco, Louisiana petroleum refinery approximately 46 times between April 1980 and June 1983. Recognizing the technical difficulties in complying with its then current NPDES permit requirements, the EPA liberalized Shell's TSS effluent limitations for outfall 002 in August 1983. While the new permit had no retroactive effect, application of the less restrictive terms to the above cited violations would decrease the number of exceedences over the three year period to approximately eight.

The NPDES permit limitations were similarly liberalized for Formosa Plastics Corp.'s Geismar, Louisiana chemical manufacturing plant. The EPA increased effluent limitations for total organic carbon ("TOC") because the plant's previous TOC limitations were found to be unnecessarily restrictive.

Finally, the EPA itself promulgated rules in 1982 reducing the generally required "pH" excursion compliance rate from 100% to only 99% compliance. See 40 C.F.R. § 401.17 (1986). The EPA determined that adjusting the standard "will establish a standard that well-operated and well-maintained plants could realistically achieve and will reserve the resources of both EPA and permittees for those instances when substantial pH control problems exist." 47 Fed.Reg. 24,534, 24,535 (1982). It is apparently undisputed that of Allied Chemical's 62 alleged pH "excursions"—incidents whereby the pH value of discharge wastewater exceeds applicable effluent ranges—the majority would not have violated current EPA guidelines, bringing compliance within the 99% requirement.

6. In an effort to ensure compliance with EPA hexavalent and total chromium effluent limitations, Shell's Norco refinery implemented a conversion to a non-chromate corrosion control system. As of February, 1985 this conversion has evidently been completed. The record reveals that Shell's last violation of permit limitations for chromium occurred on March 7, 1984.

III.

Sierra Club first argues that *Hamker* is distinguishable because it did not involve an NPDES permit. The statute belies any such distinction, for the citizen suit provision uses the term "effluent standard or limitation under this chapter" to include both permit and non-permit based violations of effluent standards found in the Clean Water Act. *See* 33 U.S.C. § 1365(f). This argument poses the classic distinction without a difference. Sierra Club has never explained why, beyond the fact that it is more likely to be a plaintiff, different standards for a facility's being "in violation" should obtain depending on whether an NPDES permit is in force. Appellant's unarticulated assumption may be that the mere aggregation of past permit violations or "exceedences" distinguishes these cases from *Hamker*. We disagree. *Hamker* explicitly rejected the applicability of the citizen suit provision to isolated past pollution discharges. *Hamker* was grounded firmly in the language of the statute, which uses the present tense formulation "in violation" to authorize citizen enforcement actions. Whether a defendant has engaged in one or ten discrete instances of impermissible effluent discharge cannot convert those actions from past to present conduct for purposes of the statute. The Fourth Circuit, which rejected *Hamker's* construction of the citizen suit provision, hesitated to do so on the distinction between a NPDES permit violation case and a non-permit case. *Chesapeake Bay Foundation v. Gwaltney of Smithville, Ltd.*, 791 F.2d 304, 312 (4th Cir.1986), *cert. granted*, — U.S. —, 107 S.Ct. 872, 93 L.Ed.2d 827 (1987).

The balance of Sierra Club's briefs is devoted to demonstrating that *Hamker* is incorrect and represents an

unworkable approach to enforcement of the Clean Water Act.[7] Even if *Hamker* were erroneously decided, our panel could not overrule a prior controlling decision in this Circuit. Only the en banc court has that authority. We are unpersuaded, however, that *Hamker* was wrongly decided. The First Circuit recently cited *Hamker* with approval in a factually similar single-discharge case. *Pawtuxet Cove Marina Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir.1987). The court concluded that "the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Id.* at 1093. In so doing, the First Circuit rejected the Fourth Circuit's construction of section 1365(a) rendered in *Chesapeake Bay Foundation v. Gwaltney*. There the court found the language "to be in violation" ambiguous and concluded that a citizen suit could be predicated upon past violations of the terms of an NPDES permit. 791 F.2d at 309. *Gwaltney* is the only circuit court that differs with the construction of section 1365(a) approved by *Hamker*.

We further disagree with Sierra Club's assertion that the Clean Water Act's enforcement provisions are rendered "unworkable" by construing "in violation" in its grammatically natural sense to require some kind of on-

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7. Sierra Club is seriously hampered in arguing *Hamker's* distinction from the present cases because Sierra Club's amicus brief in *Hamker*, asserting the arguments made here, was obviously rejected by our prior panel.

going effluent violation by the discharger.[8] The court in *Hamker* carefully explained the distinction between citizen suits and enforcement actions brought by governmental authorities. Both the federal and state governments can abundantly enforce the Clean Water Act by means of criminal and civil actions authorizing monetary or injunctive awards. 33 U.S.C. § 1319. Governmental actions were envisaged to be the central enforcement arm under the Act. *Hamker*, 756 F.2d at 395. The private enforcement action, on the other hand, is supplementary to the scheme of the statute overall. As noted in *Hamker*, the required 60 days' prior notice of a plaintiff's intent to file suit under the citizen provisions may encourage a defendant who is violating effluent limitations to "clean up his act" before suit is filed. *Id.* at 396. Moreover, where a government action is being diligently prosecuted, the citizen is barred from bringing suit. 33 U.S.C. § 1365 (b)(1)(B). We think it unlikely that Congress's explicit restrictions on the right to bring private enforcement actions significantly impair the efficacy of the general regulatory framework.

In affirming the judgments of the district courts on the foregoing grounds, we are not required to decide other issues presented by this appeal. Specifically, we need not determine whether Sierra Club has standing to prosecute the instant actions, whether private lawsuits may be filed

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8. The First Circuit noted how easy it would have been for Congress to authorize citizens suits against any party alleged "to have violated" the Clean Water Act. *Pawtuxet Cove*, 807 F.2d at 1092.

only for violations of NPDES permits currently in force,[9] or whether the citizen suit section of the statute unconstitutionally confers powers of the executive branch of government upon citizens.

Sierra Club finally argues that the district court abused its discretion in awarding costs of suit be [sic] in favor of Shell Oil Company, one of the appellees herein. Pursuant to 33 U.S.C. § 1365(d), the court is permitted to award costs of litigation, including attorney and expert witness fees, to any party whenever the court determines such award is appropriate. Sierra Club suggests no basis for finding an abuse of discretion, and we perceive none.

The judgments of the district courts are AFFIRMED.

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9. Construing § 1365(f), which allows private enforcement actions to enforce a "permit or condition thereof . . . which is in effect under this chapter", the court in *Pawtuxet Cove* held that no private enforcement action could be brought for violations of a permit under which the defendant had ceased operating. 807 F.2d at 1094.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
AT NEW ORLEANS

SIERRA CLUB 530 Bush Street San Francisco, California 94108 Plaintiffs, v. SHELL OIL COMPANY One Shell Plaza Post Office Box 10 Norco, Louisiana 70079 Defendant.	Civil Action No. 84-3583 SECT. J MAG. 2 COMPLAINT

INTRODUCTION

1. This action is a citizens' suit brought under Section 505 of the Clean Water Act ("the Act"), 33 U.S.C. § 1365. Plaintiff seeks declaratory and injunctive relief, the imposition of civil penalties, and the award of costs, including attorneys' and expert witness' fees, for Defendant's repeated violations of the terms and provisions of its National Pollutant Discharge Elimination System ("NPDES") permit number LA0003522 in violation of § 301(a) of the Act, 33 U.S.C. § 1311(a).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the claims set forth in this Complaint under Section 505(a)(1) of the Act, 33 U.S.C. § 1365(a)(1).

3. On January 20, 1984, Plaintiff gave notice of the violations and of its intent to file this suit to the Administrator of the United States Environmental Protection Agency ("EPA"), to the Louisiana Department of Natural Resources ("DNR"), Water Pollution Control Division, and to the Defendant, as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A). A copy of the notice is attached as Appendix A and is incorporated herein.

4. More than sixty days have passed since notice was served and neither EPA nor DNR has commenced and diligently prosecuted a civil or criminal action in a court of the United States or in a court of the State of Louisiana to redress these violations.

5. Venue is appropriate in the Eastern District of Louisiana pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), since the source of the violations is located within this District.

PARTIES

Plaintiffs

6. Plaintiff Sierra Club is a non-profit corporation organized under the laws of the State of California with its principal place of business at 530 Bush Street, San Francisco, California 94108, and with other offices located throughout the country. The Sierra Club is a national conservation organization having over 200,000 members, approximately 2,000 of whom reside in Louisiana and are members of its Delta Chapter. The Sierra Club was organized to study, protect, enhance, and enjoy natural and scenic resources, including the nation's navigable waters.

Through participation in numerous legislative, administrative and judicial proceedings, the Sierra Club has demonstrated its strong interest in the effective conservation and enhancement of the nation's waters and in the proper enforcement of laws designed to protect those waters.

7. Members of the Sierra Club, Delta Chapter, reside in, or own property in, or recreate in the vicinity of Bayou Trepagnier, part of Louisiana's Scenic Rivers System. There is a New Orleans Group of the Delta Chapter. These members use and enjoy the resources in, around and downstream of Bayou Trepagnier and in and around Lake Pontchartrain into which the Bayou Trepagnier flows for boating, hunting, fishing, camping, wildlife viewing, photography, and general aesthetic and spiritual enjoyment. The quality of the waters of the State of Louisiana including the waters impacted by Defendant's illegal discharge directly affects these interests of Sierra Club members. Plaintiff and its members have been, are being, and will be adversely affected and irreparably harmed by Defendant's failure to comply with its NPDES permit requirements.

Defendant

8. Defendant Shell Oil Company is organized under the laws of the State of Delaware. Defendant operates a petroleum refinery in Norco, Louisiana.

BACKGROUND

9. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States if such discharges are not authorized by or are in violation of the

terms of an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

10. EPA is responsible for issuance of NPDES permits pursuant to 33 U.S.C. § 1342 to dischargers in Louisiana since the Administrator has not approved a state permitting program for Louisiana pursuant to 33 U.S.C. § 1342(b).

11. EPA, pursuant to Section 402 of the Act, 33 U.S.C. § 1342, issued to Defendant NPDES permit number LA0003522 effective on July 23, 1977, authorizing the Defendant to discharge specified amounts of pollutants from its Norco facility into the Mississippi River and Bayou Trepagnier, which are navigable waters of the United States.

12. Section 308 of the Act, 33 U.S.C. § 1318, requires each NPDES permitee to establish and maintain records; to install, use, and maintain monitoring equipment; to sample effluent and report on a regular basis to the permit issuing Agency regarding the facility's discharge of pollutants. The reports consist of Discharge Monitoring Reports ("DMRs") and Non-Compliance Reports ("NCRs"). In these reports the permittee must state on a periodic basis whether it is in compliance with the terms of its permit.

13. Representatives of Plaintiff and other citizens' environmental organizations have examined and evaluated EPA NPDES discharge permit compliance files on a comprehensive basis for several states including Louisiana. In this research these organizations looked for those companies where they appeared to be persistent and historic patterns or permit non-compliance and where there had

been no diligent prosecution by Federal or State authorities. Defendant is such a company. Thereafter "60 day notices," such as the one described in paragraph 3 above, were sent to the Defendant and other companies as required by the Act, with copies to EPA and the State. These notices serve as final notices to the Federal and State agencies to enforce the law, while giving the company an opportunity to correct any misunderstandings as to violations of the law or to reach dispositions short of litigation, which satisfy the purposes of the Act.

14. The specific violations of permit limits identified in Appendices A and B to this Complaint were taken directly from the noncompliance and discharge monitoring reports (NCRs and DMRs) submitted to EPA by the Defendant pursuant to the reporting requirements established by Federal law and reflected in Defendant's NPDES permit.*

GENERAL ALLEGATIONS

15. Defendant operates a petroleum refinery in Norco, Louisiana. It discharges treated wastes through four point sources into the Mississippi River and Bayou Trepagnier pursuant to NPDES permit number LA0003522.

16. Defendant has submitted DMRs and NCRs to EPA covering at least the periods shown in Appendices A and B, which publicly disclose a pattern of substantial non-compliance with the Clean Water Act.

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* Plaintiffs made four typographical errors in transferring this information to the Notice Letters. Those errors and their corrections are listed in Appendix C hereto.

17. Defendant's record of noncompliance with NPDES permit number LA0003522 appears in detail in Appendices A and B.

18. Defendant's violations have been numerous and repeated. In general, between March 1980 and March 1984, Defendant has violated its permit limitations for Total Suspended Solids (TSS), Biological Oxygen Demand (BOD), Chemical Oxygen Demand (COD), Hexavalent Chromium, Total Chromium, Phenols, Total Organic Carbon and pH at least 120 times.

19. On information and belief, Plaintiff further alleges that Defendant has violated the permit limitations subsequent to the violations listed in Appendices A and B and continues to be in violation of the Act.

20 Plaintiff alleges that there has been no diligent prosecution of Defendant through civil or criminal court action by the EPA or the DNR concerning the specific charged violations.

21. Because of the extensive history of violations of the effluent standards imposed by NPDES permit number LA0003522, Plaintiff believes and alleges that without imposition of appropriate civil penalties and the issuance of an injunction, Shell Oil Company will continue to violate its NPDES permit creating further injury to the environment and others.

CLAIMS

22. Plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 21 and Appendices A and B to this Complaint.

23. Defendant's wastewater discharges identified in Appendices A and B are discharges from point sources into navigable waters of the United States within the meaning of Section 301 of the Act, 33 U.S.C. § 1311.

24. Defendant's wastewater discharges from Outfalls 002 and 004 as listed in Appendices A and B to the Complaint, and those which have been committed subsequent to those listed in Appendices A and B, are violations of its permit limitations for the pollutants listed in paragraph 18 above, and constitute violations of Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342.

RELIEF

Wherefore, Plaintiff respectfully requests this Court to grant the following relief:

A. Declare Defendant Shell Oil Company to have violated and to be in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342;

B. Enjoin the Defendant from operating its facility in Norco, Louisiana in such a manner as will result in the further violation of the defendant's NPDES permit number LA0003522;

C. Authorize Plaintiff for the period beginning on the date of the Court's order and running for one year after Defendant achieve compliance with all of the limitations in its NPDES permit, to sample or to arrange sampling of any discharge of pollutants from Defendant's facility with the cost of the sampling to be borne by Defendant;

D. Order Defendant to provide Plaintiff, for the period beginning on the date of the Court's order and running for one year after Defendant achieves compliance with all of the limitations of its NPDES permit, with a copy of all reports and other documents which Defendant submits to the Federal or State government regarding Defendant's NPDES permit, to be submitted at the time it is submitted to these authorities;

E. Order Defendant to pay civil penalties of $10,000 per day of violation for each violation pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d) and 1365(a), including those listed in Appendices A and B and violations committed subsequent to those listed in Appendices A and B;

F. Award Plaintiff its costs, including reasonable attorneys' and expert witness' fees, as authorized by Section 505(d) of the Act, 33 U.S.C. 1365(d); and

G. Award such other and further relief as this Court deems appropriate.

Dated: .....

.....

MICHAEL OSBORNE
Osborne, McComiskey and
Richardson-Harp
3420 Prytania Street
New Orleans, Louisiana 70115
504/891-4418

Local Counsel for Plaintiff

Respectfully submitted,

KATHERINE P. RANSEL*
NANCY C. CRISMAN
NICHOLAS C. YOST
JOHN VANCE HUGHES

Center for Law in the
Public Interest
1575 Eye Street, N.W.
Suite 650
Washington, D.C. 20005-1105
202/371-0199

Counsel for Plaintiff

*Trial Attorney for Plaintiff

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

SIERRA CLUB
VERSUS
COPOLYMER RUBBER AND
CHEMICAL CORPORATION

CIVIL ACTION
NUMBER 84-407-B

SIERRA CLUB
VERSUS
ALLIED CHEMICAL CORPORATION

CIVIL ACTION
NUMBER 84-408-B

SIERRA CLUB
VERSUS
BERCEN SOUTHERN DIVISION OF
BERCEN INCORPORATED

CIVIL ACTION
NUMBER 84-409-B

SIERRA CLUB
VERSUS
FORMOSA PLASTICS CORPORATION

CIVIL ACTION
NUMBER 84-410-B

* * * * *

FRANK J. POLOZOLA, District Judge:

These consolidated cases[1] were filed by Sierra Club under the citizen suit provision of the Clean Water Act, 33 U.S.C. 1365(a). In each of these cases, Sierra Club contends the defendants have violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

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[1]The Sierra Club filed separate suits against Copolymer Rubber and Chemical Corporation ("Copolymer") (CA 84-407-B), Allied Chemical Corporation ("Allied") (CA 84-408-B), Bercen Southern Division of Bercen Incorporated ("Bercen") (CA 84-409-B), and Formosa Plastics Corporation ("Formosa") (CA 84-410-B). Because the same jurisdictional issue is involved in each cases, the Court has consolidated the cases in the interest of judicial economy.

I Procedural History of the Cases

After these suits were filed, the standing of the Sierra Club to bring these suits became an issue in this case. In order to determine the legal standard to be applied by the Court on the standing issue, the Court stayed discovery on all issues except standing and ordered the parties to file briefs on the issue. After the Court denied plaintiff's motion for partial summary judgment on the standing issue, the Fifth Circuit Court of Appeals rendered its decision in *Hamker v. Diamond Shamrock Chemical Company*, 756 F.2d 392 (5th Cir. 1985). Thereafter, the Court ordered the parties to file briefs on whether the Court had jurisdiction in these cases under the *Hamker* decision. In addition, Copolymer filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[2] Briefs were filed, oral argument was held on two occasions and the matter was submitted to the Court.

II The Court's Jurisdiction

It is well settled that a federal court is empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress.[3] It is also equally settled that a federal court has an obligation to notice want of subject matter jurisdiction

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[2]After oral argument was held on the *Hamker* jurisdiction issue and the matter was submitted to the Court, Sierra Club filed another motion for partial summary judgment on the issues of standing and liability.

[3]13 Wright, Miller & Cooper, *Federal Practice and Procedure Jurisdiction* § 3522.

on its own motion.[4] Where the subject matter jurisdiction of the Court has been challenged, the burden is on the party claiming jurisdiction to demonstrate that jurisdiction of subject matter exists.[5] Thus, the burden is upon the Sierra Club to demonstrate that subject matter jurisdiction exist in these cases.

III The Hamaker Decision

Hamaker v. Diamond Shamrock Chemical Company, 756 F.2d 392, involved the very same issue as that presented to this Court—does Section 1365(a) permit a citizen suit for past violations, or must the defendant be "in violation" of relevant standards, limitations and orders on the date the citizen suit is filed? After thoroughly discussing the history, meaning and purposes of Section 1365(a)[6] as it relates to the other provisions of the Clean Water Act, the Fifth Circuit Court of Appeals concluded:

> To summarize, the ordinary meaning of the words of the statute and its prior Supreme Court interpretation indicate that Section 1365 does not authorize citizens suits seeking either injunctive relief or the imposition of civil penalties where the defendant is not alleged to be in violation of an effluent standard, limitation or order. The section "authorizes only prospective re-

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[4]Summer v. Mata, 449 U.S. 539, 547 n. 2, 101 S.Ct. 764, 769 n. 2, 66 L.Ed. 722 (1981); Louisville & N. R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908); and Cameron v. Hodges, 127 U.S. 322, 8 S.Ct. 1154, 32 L.Ed. 132 (1888).

[5]McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1935); Diefenthal v. Civil Aeronautics Board, 681 F.2d 1039 (5th Cir. 1982), *cert. denied* 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed. 2d 956 (1983); Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975).

[6]33 U.S.C. 1365(a) provides in pertinent part that "any citizen may commence a civil action . . . against any person . . . who is alleged *to be in violation of*" the relevant standards, limitations, or orders. (Emphasis supplied.)

lief" even though "civil penalties . . . may be ordered by the court." 756 F.2d at 396[7]

The Sierra Club argues that the *Hamker* case is wrong and that the appellate judges misinterpreted the provisions of the Clean Water Act.[8]

This Court is not only bound by the *Hamker* decision, but the Court must note that it fully agrees with the interpretation placed on § 1365 in the majority opinion.[9]

IV The Court Has No Subject Matter Jurisdiction

Since the Court and Copolymer have questioned the Court's subject matter jurisdiction, the Sierra Club must affirmatively show that the Court has subject matter jurisdiction. Sierra Club has failed to demonstrate that the Court has subject matter jurisdiction in these cases. In each of the cases, the Sierra Club alleges that the defendants are in violation of an effluent standard, limitation or order at the time the suits were filed.[10] Since this allegation has been challenged by each of the defendants, the

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[7]Judge Jolly, in his opinion, emphasized on at least twenty separate occasions that the defendant must be "in violation" at the time the suit is filed in order for a citizen to file a suit under § 1365(a).

[8]On oral argument, counsel for Sierra Club stated that the same argument the Sierra Club was making to this Court was made to the Fifth Circuit Court of Appeals in an amicus brief on rehearing in the *Hamker* case. The *Hamker* Court obviously rejected these arguments.

[9]The Court does not believe that it is bound by the language in the concurring opinion regarding a suit filed against a "chronic episodic violator," 756 F.2d at 399, but even if this language applies, the facts as presented in the case sub judice fail to support the subject matter jurisdiction of the Court.

[10]The allegations are set forth in paragraph 19 of each complaint filed in these cases.

Sierra Club must present proof that the defendants were "in violation" at the time the suits were filed. However, the evidence[11] presented in these cases clearly and unequivocally shows that none of the defendants were in violation at the time the suits were filed.[12]

IV [sic] Conclusion

The Court finds that the defendants were not in violation of any standard, limitation or order at the time the suits were filed herein. Therefore, the Sierra Club is precluded from filing a citizens suit against the defendants under Section 1365(a) of the Act. Since the Court does not have subject matter jurisdiction, plaintiff's suits shall be dismissed.[13]

Baton Rouge, Louisiana, November 7, 1985.

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[11]The parties have filed numerous affidavits and exhibits into the record on the jurisdiction issue.

[12]During oral argument, the Court unsuccessfully attempted on numerous occasions to have counsel for the Sierra Club point out any violations of any defendant which were pending on the date the suits were filed. Not only did plaintiff fail to set forth these violations during oral argument, but the record clearly demonstrates there were no violations on the dates the suits were filed herein.

[13]The Court's dismissal will be without prejudice. As noted in *Hamker*, the plaintiff may have a state damage claim which may be brought in a state court. Hamker v. Diamond Shamrock Chemical Company, 756 F.2d 392, 396 (5th Cir. 1985). The Court expresses no opinion as to the validity of such a claim.

NOTICE MAILED TO:

DATE 11/8 BY PJ
Mr. Osborne
Byrd
Harburt
Cruilj
Lt
JG(6)

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
NOVEMBER 8, 1985
POLOZOLA, J.

SIERRA CLUB — CIVIL ACTION

VERSUS — NUMBER 85-147-B

MONOCHEM, INCORPORATED

(Received November 21, 1985)

This matter is before the court on the motion of the defendant Monochem, Incorporated ("Monochem"), to dismiss this case for lack of subject matter jurisdiction.

A review of the record, including affidavits and exhibits, reveal that Monochem was not "in violation" of an effluent standard, limitation or order at the time the present suit was filed. Therefore, for the reasons set forth in *Sierra Club v. Copolymer Rubber and Chemical Company, et al*, — F.Supp. — (M.D. La. 1985), this suit must be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Therefore:

IT IS ORDERED that the motion of the defendant, Monochem, Incorporated, to dismiss the present suit for lack of subject matter jurisdiction be, and it is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's suit be dismissed without prejudice.

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

NOTICE MAILED TO:

DATED 11/8 BY PJ
Osborne
Hallo
(6) Philip
LT.
JG.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SIERRA CLUB	CIVIL ACTION
VERSUS	NO. 84-3583
SHELL OIL COMPANY	SECTION "J"

JUDGMENT

(Filed November 4, 1985)

The Court having previously granted the motion of defendant to dismiss.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Shell Oil Company, against plaintiff, Sierra Club, dismissing said plaintiff's suit, with costs.

Dated at New Orleans, Louisiana, this 4th day of November, 1985.

/s/ Patrick E. Carr
United States District Judge